

Date: March 18, 2013
To: Rep. McNally
Cc: House Local Government Committee Members
Sen. Buttrey
From: Marty Tuttle, Chief Legal Counsel
Department of Commerce

Regarding SB 147, the Department testified at House Local Government committee about the existing legal limitations on decisions made by a local governing body to impose mitigation on a proposed subdivision. You asked for clarification as to where in statute and case law these limitations are found:

- 1) Subdivision law provides that a local governing body may not unreasonably restrict a landowner's ability to develop their land. See 76-3-608(5)(a).
- 2) Any decision by a local government with respect to the approval, denial, or conditional approval of a subdivision application must not be arbitrary and capricious, and must be supported by the substantial evidence in the record. "The applicable standard of review is whether the information upon which the Board based its decision 'is so lacking in fact and foundation' that 'it is clearly unreasonable and constitutes an abuse of discretion.'" (*North 93 Neighbors, Inc. v. Bd. of County Comm'rs*, 2006 MT 132, P44 (Mont. 2006), citing *Schanz v. Billings*, 182 Mont. 328, at 335-36 (Mont. 1979).
- 3) "Exactions" are subject to a heightened scrutiny, a higher standard of review, than normal regulatory takings claims. The courts have long recognized that requiring a property owner to provide public benefits, particularly in the form of property dedication, in exchange for the issuance of a development permit, requires very close review by the courts. The local governing body must demonstrate both of the following:
 - (1) a "nexus," or direct relationship, between the type of impact anticipated and the type of mitigation being required. *Nollan v. California Coastal Commission*, 483 US 825 (1987).
 - (2) the amount, or extent, of the mitigation is "roughly proportional" to the amount, or extent, of impacts anticipated from the development. *Dolan v. City of Tigard*, 512 US 374 (1994).

